IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant, v. JAYDEANE FRANCIS ELL, Respondent.	)	No. 62768-6-I DIVISION ONE UNPUBLISHED OPINION FILED: July 19, 2010

Becker, J. — Jaydeane Francis Ell challenges his convictions and sentence for rape in the second degree, two counts of assault in the second degree, and felony harassment, offenses he committed when beating up his live-in girl friend, RHM, one night in January 2008. Finding no error, we affirm.

RHM was accompanied to an emergency room the day after the assaults and reported Ell had beaten, threatened, and raped her. She was examined by a sexual assault nurse and a doctor, both of whom testified about their observations and RHM's statements. Months later, RHM recanted as to the rape charge, and then testified at trial that the sexual intercourse had been consensual and she could not remember the alleged threats. Ell appeals on several grounds, including right to counsel, evidentiary, and jury issues.

Right to Counsel

Ell argues the trial court violated his right to counsel by denying him new counsel and a continuance after he reported his attorney revealed confidences and they had an irreconcilable conflict and a breakdown in communications. We review a trial court's decision to deny substitute counsel and continuances for abuse of discretion. State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004).

On July 17, 2008, three months before trial, Ell made a motion before Judge Steven Mura to replace his court-appointed attorney, Lance W. Hendrix. Ell told the court Hendrix had contacted him only twice during the first four months of his pretrial incarceration, and only to persuade him to agree to a continuance. Ell claimed Hendrix denied him full discovery. The court inquired of defense counsel and was told Ell had been given an opportunity to view the material provided by the State in discovery but not to have copies. Ell asserted that in every encounter with Hendrix "he is either hanging up the phone on me disputedly or denying further communications with me out of petulance" and alleged there had been "a complete breakdown" of communication between them. Judge Mura responded to Ell by saying, "I was defense counsel and probably defended two thousand people, and the worst way an attorney can spend time, Mr. Ell, is spending his time with a client. There's not a whole lot of time that needs to be spent with a client. What needs to be spent is with the evidence and the witnesses because that's what they need to have in the

courtroom. I know oftentimes clients want them sitting there over and over and over again but that's not good use of the attorney's time."

Ell then claimed Hendrix had revealed his confidences and submitted as proof a statement from Dennis Reames, which said, in its entirety, "Mr. Hendrix of the Whatcom County Public Defenders office revealed the confidences improperly of Mr. Ell's case by way of yelling that had brought my attention to there of." Neither the statement nor Ell specified what these confidences were. Judge Mura told Ell the statement did not provide any factual basis for saying that confidences were disclosed. "The only thing this says is that he heard Mr. Hendrix raising his voice at you."

Ell said Hendrix "has blown up on me several times, Your Honor, cussed me out, called me a dumb fucking so and so mother . . . . I can't make any informed decisions without full disclosure." Ell said he did not think he could work with Hendrix anymore. The court reviewed the status of the State's discovery with Hendrix and Ell to determine whether there were pages missing as Ell alleged. Ell repeated that he wanted full disclosure. When Ell said he did not think he could work with Hendrix anymore, the court told Ell he could represent himself. Ell replied that he did not want to represent himself; what he needed was a change of attorney. The court denied the motion, but ordered Hendrix to give Ell the missing pages of discovery, which Hendrix had said were duplicative and redacted beyond use, and to allow Ell to view RHM's medical records, including the rape kit evidence. The court said, "He is entitled to it, it's

his case."

On October 13, 2008, just before trial, Ell complained to the court that Hendrix had come to see him only once during the preceding nine months and the meeting lasted less than two hours. Ell asked the court for a continuance, saying this was not sufficient time to prepare for trial. He said Hendrix failed to show up for an appointment scheduled for the previous night. Judge Charles R. Snyder asked Hendrix whether he was prepared for trial, and the lawyer replied that he was ready and had interviewed witnesses and gone over with Ell what he expected to be the testimony of the State's witnesses. Judge Snyder denied the continuance, citing Hendrix's assurances and the lateness of Ell's request when continuances had previously been granted. During trial, Ell again tried to voice his concerns about Hendrix's representation, with Hendrix telling the court at one point, "We're apparently having a breakdown in communications."

Based on these portions of the record, Ell claims he was denied his right to counsel because of an irreconcilable conflict with his attorney which the trial court failed to look into adequately.

If the attorney-client relationship completely collapses, "the refusal to substitute new counsel violates the defendant's Sixth Amendment right to effective assistance of counsel." In re Pers. Restraint of Stenson (Stenson 2), 142 Wn.2d 710, 722, 16 P.3d 1 (2001), citing United States v. Moore, 159 F.3d 1154, 1158 (9th Cir. 1998). To justify appointment of new counsel, a defendant must show good cause to warrant substitution of counsel, such as a conflict of

interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. Varga, 151 Wn.2d at 200.

A defendant does not become entitled to new counsel merely by claiming a conflict is irreconcilable. To determine whether the trial court erred and an irreconcilable conflict existed, this court considers: (1) the extent of the conflict, (2) the adequacy of the trial court's inquiry, and (3) the timeliness of the motion. Stenson 2, 142 Wn.2d at 723-724.

With respect to the first Stenson 2 factor, the appellate court must analyze both (1) the extent and nature of the breakdown in communication between attorney and client, and (2) the breakdown's effect on the representation the client actually received. Stenson 2, 142 Wn.2d at 724. Ell contends the conflict between him and Hendrix was substantial and irreconcilable, as in Moore. There, the Ninth Circuit Court of Appeals found an irreconcilable conflict where, in "consistent, persistent representations to the court," the defendant "presented strong evidence of an irreconcilable conflict"—he alleged the attorney had failed to advise him of plea negotiations, had failed to investigate, and did not communicate important information. In addition, the attorney confirmed they had serious difficulty communicating with each other and told the court he felt physically threatened by Moore. Moore, 159 F.3d at 1159. "Other than allowing Cozens and Moore to express their disagreements, the court failed to question either Cozens or Moore privately and in depth." Moore, 159 F.3d at 1160.

Ell also raises two other cases discussed in Moore. In one case, the Ninth Circuit found grounds for reversal where a defendant, dissatisfied with his lawyer to the extent that he refused to cooperate with him, made four separate motions to substitute counsel between when he was charged and trial, yet each time the court summarily denied the motion without inquiry. Brown v. Craven, 424 F.2d 1166, 1169 (9th Cir. 1970). In another, United States v. Williams, the appellate court reversed where both the defendant and counsel agreed they were incompatible and counsel confirmed that the client-attorney relationship "had been a stormy one with quarrels, bad language, threats, and counter-threats." United States v. Williams, 594 F.2d 1258, 1260 (9th Cir. 1979). The trial court in Williams had summarily denied without inquiry the defendant's first motion for substitute counsel, made more than a month before trial. And when the motion was renewed a week before trial, the trial court expressed the view that as a matter of policy, an indigent defendant should not be allowed to "fire" his attorney.

The showing of conflict here is not comparable to the facts of Moore, Brown, and Williams. Hendrix and Ell communicated, though not enough, or in a manner, to satisfy Ell. The day before trial, Ell complained that Hendrix met with him only once and had missed an appointment they had on the eve of trial, but these allegations do not establish an irreconcilable conflict. In Stenson 2, the Supreme Court did not find such a conflict where Stenson claimed his attorney visited him less than 10 times in 10 months for a death penalty case and refused

to investigate certain matters, and there were temporary breakdowns in communication and differences of opinion on trial strategy. Stenson 2, 142 Wn.2d at 727-33.[1]

Moreover, as in Stenson 2, the court's inquiry three months before trial "appears to have been sufficiently searching." Stenson 2, 142 Wn.2d at 731. The court ordered Hendrix to provide Ell all the discovery he was seeking, and nothing in the record shows Hendrix failed to comply. Ell misunderstands Judge Mura's response to his concerns; the judge did not say defense attorneys have no obligation to meet with clients, just that their time is often better spent meeting with witnesses and tracking down evidence. The judge also inquired into Ell's claim that Hendrix had revealed confidences, but found that not only was the witness statement not notarized, it provided no specifics or factual basis to support the allegations, and neither did Ell. Because the court allowed Ell to express his concerns fully, inquired into them, and took action to resolve the specific complaint about lack of access to discovery materials, we conclude there was no abuse of discretion in the denial of Ell's first motion for new counsel.

The timeliness factor weighed against Ell's second complaint, a request for a continuance made on the eve of trial alleging that the defense was

[1] In Stenson v. Lambert, the Ninth Circuit said an irreconcilable conflict in violation of the Sixth Amendment "occurs only where there is a complete breakdown in communication between the attorney and client, and the breakdown prevents effective assistance of counsel." 504 F.3d 873, 886 (9th Cir. 2007) (holding Washington Supreme Court's ruling that Stenson had not shown an irreconcilable conflict was not contrary to federal law), cert. denied, 129 S. Ct. 247 (2008).

unprepared. Because Ell alleged that Hendrix had not spent sufficient time with him, the denial of the motion for a continuance is appropriately considered in connection with Ell's claim that an irreconcilable conflict denied him the assistance of counsel. The court refused to continue the trial, giving more weight to Hendrix's assurances that he was ready for trial than to Ell's complaints about the attorney's failure to meet with him. But the court also cited the lateness of the motion and noted that continuances had been granted earlier and Ell's previous motion for new counsel had been considered but denied. This was an appropriate exercise of discretion. Where the request comes on the eve of trial, "the Court may, in the exercise of its sound discretion, refuse to delay the trial to obtain new counsel." Williams, 594 F.2d at 1260-61, quoted in Stenson 2, 142 Wn.2d at 732.

A defendant is not entitled to a particular lawyer with whom he thinks he can have a meaningful attorney-client relationship, and general dissatisfaction and distrust with an attorney's performance is not enough to justify a change in appointed counsel. Moore, 159 F.3d at 1158; Varga, 151 Wn.2d at 200. The trial court did not abuse its discretion nor violate Ell's right to counsel by denying his motions for substitute counsel and a continuance.

CrR 3.5 Hearing

Ell argues the trial court erred by admitting his statements to police without holding a CrR 3.5 hearing to determine whether they were voluntary. We disagree because Ell did not object to the lack of a hearing, and he testified

on direct about his exchange with police, making the matter fair game on cross-examination. The record does not show Ell's statements were involuntary.

When there is no objection to the court's failure to hold a CrR 3.5 hearing, a defendant has the burden of proving this failure is a manifest error affecting a constitutional right, enabling him to raise it for the first time on appeal. RAP 2.5(a)(3); State v. Williams, 137 Wn.2d 746, 748, 975 P.2d 963 (1999). For an error to be "manifest," a defendant must show actual prejudice. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). CrR 3.5(a) provides: "When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible." The court must inform the defendant of his right to have a hearing. CrR 3.5(a). The purpose of the rule is to prevent the admission of defendant's involuntary incriminating statements. Williams, 137 Wn.2d at 751.

One of the State's motions in limine sought to preclude the defense from introducing Ell's statements to police. The prosecutor told the court a CrR 3.5 hearing was unnecessary because she would not be offering any such statements by Ell. Ell's attorney did not object or request a voluntariness hearing. But, as part of his defense, Ell testified about the night in question and his conversations with police the following day. Bellingham police contacted Ell after work at the motel where he and RHM lived and handcuffed him. Ell testified he did not know why the officer was there, but remembered telling him

he had a "bad feeling about this." Ell said the officer did not read him his Miranda[2] rights until they arrived at the jail, but he answered the officer's questions, though he was vague because the officer was vague with him. Ell testified he did not know why police were there, but "had the notion that it was a domestic violence [allegation] of some sort."

On cross-examination, the prosecutor asked Ell about several statements he made to police:

> Q. Do you remember stating to Officer [Jeffrey] Hinds that you wanted to help Officer Hinds out, but you drank a lot of alcohol, blacked out, and didn't remember anything?
> A. I think I told him I passed out. I don't know if I said I blacked out to him.
> . . . .
> Q. . . . Do you remember telling Officer Hinds that you tried to call or text [RHM] a few times today to see what had happened last night?
> A. I might have said something along those lines. . . .
> Q. Do you remember telling Officer Hinds that you just had a bad feeling about last night?
> A. Of course. There was cops all over my room. I mean, wouldn't you have a bad feeling if they were all over you?
> . . . .
> Q. Did you say that to Officer Hinds, I just want to find out what happened so I can apologize?
> A. Yeah.
> Q. Did you say to Officer Hinds if I did get physical with her last night, I deeply regret it?
> . . . .
> A. That's the key word there, if. Yes.

Ell's attorney did not object. The prosecutor recalled Officer Hinds who testified he arrested Ell upon arriving at the motel and read him his Miranda rights, which

[2] Miranda v. Arizona, 384 U.S. 436, 478-79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Miranda safeguards apply as soon as a person's freedom is restricted to a degree associated with formal arrest. State v. D.R., 84 Wn. App. 832, 836, 930 P.2d 350, review denied, 132 Wn.2d 1015 (1997).

Ell waived. Officer Hinds testified to the same exchange Ell had described.

CrR 3.5 hearings are mandatory where the State seeks to use custodial statements of the defendant, but failure to hold such a hearing is not prejudicial if the statements are voluntary and made after the defendant has been properly advised of his constitutional rights. State v. Renfro, 28 Wn. App. 248, 253, 622 P.2d 1295 (1981), aff'd, 96 Wn.2d 902, 639 P.2d 737, cert. denied, 459 U.S. 842 (1982). Where a defendant does not allege his statements were involuntary, there is no manifest error, and reversal is not required unless the record shows involuntariness. Williams, 137 Wn.2d at 754; State v. Kidd, 36 Wn. App. 503, 509, 674 P.2d 674 (1983). A custodial statement is voluntary if it is not the product of duress, coercion, promise, or inducements of any kind. State v. McKeown, 23 Wn. App. 582, 596 P.2d 1100 (1979).

Here, Ell does not specifically argue his statements were involuntary or the product of duress or coercion. Rather, Ell argues the State went back on its word that it did not intend to offer any statements by Ell and thus a 3.5 hearing was unnecessary. Ell's brief claims "there was an issue regarding voluntariness" because Ell testified the officer handcuffed him and did not read him his rights until they arrived at jail. But Ell did not object to the lack of a 3.5 hearing at the time, nor to the prosecutor's questions regarding his statements to police; nothing in the record shows his statements were involuntary. Moreover, Ell testified on his own behalf about his statements to police, thereby subjecting himself to cross-examination. State v. Graham, 59 Wn. App. 418, 427, 798 P.2d

314 (1990). And Officer Hinds testified he arrested Ell immediately upon arriving at the motel room and read him his Miranda rights. Ell waived his objection to the lack of a 3.5 hearing and fails to show his statements were involuntary.

Sufficiency of the Evidence

Ell contends there was insufficient evidence to support the rape in the second degree and felony harassment convictions, in part because RHM recanted some of her accusations and medical hearsay was improperly admitted. In a sufficiency inquiry, we review the evidence in the light most favorable to the prosecution and ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Wentz, 149 Wn.2d 342, 347, 68 P.3d 282 (2003). We defer to the trier of fact on issues of credibility and persuasiveness of the evidence. State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

RHM testified that in January 2008, she was romantically involved with Ell, whom she had known since she was 10 because her brothers lived with his parents and she would visit during the summer. She was living with Ell in a Bellingham motel and had been seeing him since she left her husband, with whom she had two daughters who were in foster care. On January 15, 2008, RHM came home around 7 or 8 p.m., and at some point, Ell woke up and became angry because of a comment or joke she made about pregnancy.

RHM testified she remembered only some parts of the incident because she was "trying to move on" and "to forget what happened . . . that night." She

testified that Ell grabbed her hair, slapped her more than once, tried to grab her around her throat, hit her with his fists, and possibly bit her hand. RHM said Ell yelled at her: "'You're just like your mom, a devious bitch. Don't you fucking look at me. Only devious bitches look men in the eye'." She told Ell she had to visit her children and tried to cover her face and neck to avoid visible injuries. She testified the beating was painful, but that she did not black out when Ell's hands were on her throat and could not remember telling the doctor Ell choked her several times.

RHM testified that at some point during the night, Ell tried to put his penis in her anus. She did not recall telling a police officer that she agreed to anal intercourse out of fear. Rather, she testified she agreed to try it because they had been talking about anal sex for a while, but it hurt and was uncomfortable. On cross-examination, RHM testified she enjoyed rough sex, including restraining, biting, and spanking. She said several times that Ell did not rape or sexually assault her.

Ell testified he is a "light drinker," but was "damn near diminished capacity" that night because he had had four or five shots of vodka. He said he remembered RHM waking him up but had no memory of hitting, biting, or raping her. The next morning, Ell got up early and RHM drove him to work.

RHM also went to work, at the Nooksack Casino where she was a dealer. She testified her friend Monica Abitia was concerned because RHM was bruised and her hair disheveled. RHM testified she told Abitia that Ell hit her when he

was drunk; RHM's co-workers convinced her to go to the hospital. Abitia testified she went with RHM to Human Resources at the casino to ensure that Ell could not be there while RHM was there. While at the office, RHM agreed to call the police. Abitia testified RHM was very upset and crying when she talked with the Nooksack police officer, who followed her to the hospital.

At St. Joseph's Hospital, Sexual Assault Nurse Examiner Cathy Hardy examined RHM. Hardy testified RHM complained of strangulation, had bruising and red marks on her neck, and said it hurt when she swallowed. RHM had multiple bruises on her face and body, swelling on her face and hands, and abrasions. The nurse said RHM reported Ell had tried to break her hand and had bitten her because she was trying to protect her face.

According to Hardy, RHM said Ell told her that if "'she made noise, and the cops came, "he'd kill me even if the cops came. He'd snap my neck three different ways."'" Defense counsel did not object to the hearsay testimony, but RHM denied saying this to Hardy. RHM testified she did not remember telling police that Ell threatened to strangle her to death or kill her or her family. She could not say for sure whether Ell threatened her or not.

RHM testified that Ell called her within a couple days after his arrest and told her he was facing 30 years to life. The jury heard recordings from the jail of Ell's phone calls and attempted phone calls to RHM. RHM also testified she may have said some things to the police out of anger because Ell had said he was kissing another woman. She testified she felt pressured to have a sexual

assault examination because she was afraid she would not get her children back from foster care, and she could not recall telling any medical personnel or police that Ell had raped her.

Nurse Hardy testified RHM said she was penetrated vaginally, orally, and rectally. The nurse testified there was no obvious redness or bruising of RHM's anal area. According to Hardy, RHM said Ell was frustrated that he was unable to ejaculate and just got meaner; on the stand, RHM did not recall saying that. The nurse said RHM told her the entire incident lasted five hours, and at one point, Ell let her use the bathroom. Emergency room doctor Nils Naviaux testified RHM said she had been punched, bitten, choked, and sexually assaulted vaginally, anally, and orally. Dr. Naviaux said RHM complained of pain in her vaginal and rectal area, but there were no visible injuries there. The doctor said the bruising on RHM's neck was consistent with choking.

Abitia, the police officer, and the public defender's investigator each testified that RHM said she was raped, contrary to her testimony at trial that she was not. The trial court instructed the jury to consider these witnesses' testimony only for the purpose of impeaching RHM's testimony.

Although RHM testified the sex was consensual, she said she was in great pain while Ell beat her, that she cried and pleaded with him to stop punching her, and that she didn't consider the beating to be rough sex. She testified she struggled throughout the incident, which lasted five hours. She said the anal sex hurt and was uncomfortable, but she allowed Ell to do it anyway.

She said the intercourse occurred in the middle of a beating during which she was too frightened to go to the bathroom without Ell's permission.

Nurse Hardy testified RHM was the most severely beaten woman she had seen in her 28 years as a nurse. She said RHM told her she had been vaginally penetrated once or twice when Ell missed her anus, but that it was mostly rectal penetration. The vaginal and anal swabs from the sexual assault exam came back positive for semen; Ell was included as a contributor to the DNA sample. The emergency room doctor testified that RHM complained of perineal pain, neck pain, and other pain. There were clumps of hair in the motel room.

A. *Conviction for Rape in the Second Degree*

To convict Ell of second degree rape, the State was required to prove he engaged in sexual intercourse with RHM by forcible compulsion. RCW 9A.44.050(1)(A). Forcible compulsion is "physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person." RCW 9A.44.010(6) (emphasis added). To prove forcible compulsion, the evidence must be sufficient to show the force exerted "was directed at overcoming the victim's resistance and was more than that which is normally required to achieve penetration." State v. McKnight, 54 Wn. App. 521, 528, 774 P.2d 532 (1989). A victim need not have resisted physically for a jury to find force that overcomes resistance. McKnight, 54 Wn. App. at 525-26. Whether the element of resistance has been met involves a "fact sensitive determination based on the

totality of the circumstances, including the victim's words and conduct." McKnight, 54 Wn. App. at 526.

Considering RHM's testimony about the severity of the beating, the forensic evidence and photographs, and the testimony of medical personnel, a rational trier of fact could find Ell raped RHM through forcible compulsion. As the State points out, RHM's testimony boils down to an account of an hours long beating that caused her "great pain," in the middle of which she agreed to have anal sex with Ell, only to have him continue beating her once it was over. The jurors could reasonably give less weight to RHM's testimony that such intercourse was consensual and find the other evidence more persuasive. Viewing the evidence in the light most favorable to the prosecution, as we must, we find it sufficient to sustain Ell's conviction for rape in the second degree.

B. *Threats and Conviction for Felony Harassment*

Ell also contends there was insufficient evidence of the type of threats that would go toward both the rape and the felony harassment convictions. But the State did not need evidence of such threats to prove rape in the second degree, since sufficient evidence existed of force necessary to overcome RHM's resistance. However, to convict Ell of felony harassment, the State did have to prove he knowingly threatened to kill RHM, and she reasonably feared the threat would be carried out. RCW 9A.46.020; State v. C.G., 150 Wn.2d 604, 608-09, 80 P.3d 594 (2003).

To avoid unconstitutional infringement of protected speech, the

harassment statute must be read to prohibit only "true threats." State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). A true threat is a statement made "'under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or take the life'" of another. Kilburn, 151 Wn.2d at 43 (alteration in original) (internal quotation marks omitted) (quoting State v. Knowles, 91 Wn. App. 367, 373, 957 P.2d 797, review denied, 136 Wn.2d 1029 (1998)). But the threat to kill need not be literal, and "it is not proper to limit the inquiry to a literal translation of the words spoken." C.G., 150 Wn.2d at 611.

Ell's argument regarding insufficient evidence of felony harassment is predicated on his claim that defense counsel was ineffective for failing to object to medical hearsay testimony regarding his threats. But, as discussed below, courts have found such hearsay admissible in domestic violence and sexual abuse cases, under the rationale that developing a safety plan for a victim is part of her treatment. Thus, even if defense counsel had objected to the nurse examiner's testimony, the trial court would likely have admitted the hearsay under ER 803(a)(4). Because the prejudice prong of Ell's ineffective assistance claim fails, we must consider the evidence of threats as the jury did, rather than some counterfactual scenario in which the medical hearsay was excluded.

According to Nurse Hardy, RHM reported Ell saying that if she made noise, "'he'd kill me even if the cops came. He'd snap my neck three different ways.'" Although on the stand RHM recanted this, she nonetheless testified that

Ell beat, punched, and bit her, and said, "'Don't you fucking look at me. Only devious bitches look men in the eye.'" RHM also testified she remembered Ell threatening to strangle her and telling her she had better stay on the bed. Indeed, both the emergency room doctor and Nurse Hardy considered the marks around RHM's neck to be consistent with strangulation. And the jury found Ell guilty of second degree assault by strangulation.

RHM feared antagonizing Ell enough that she asked for permission to go the bathroom, and the Nooksack police officer followed her to the hospital from the casino. She testified she "wasn't sure" but thought Ell might kill her if he kept beating her. RHM appeared quite scared, anxious, and traumatized to hospital personnel.

Taking this testimony, the medical hearsay, and the physical evidence of strangulation in the light most favorable to the prosecution, we conclude a rational trier of fact could find Ell knowingly threatened to kill RHM and she reasonably feared that threat.

Ineffective Assistance of Counsel

Ell claims his attorney provided ineffective assistance by failing to object to medical hearsay testimony that was unnecessary for diagnosis or treatment, and by failing to request a jury instruction on voluntary intoxication. To prove ineffective assistance of counsel, Ell must show (1) his attorney's conduct falls below a minimum objective standard of reasonableness and (2) there is a reasonable probability that, but for the attorney's deficient performance, the outcome would have been different. State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289, cert. denied, 510 U.S. 944 (1993); Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Strickland, 466 U.S. at 697. And, "'not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.'" State v. West, 139 Wn.2d 37, 46, 983 P.2d 617 (1999), quoting Strickland, 466 U.S. at 693.

A. *Medical Hearsay Testimony*

Ell argues that if Hendrix had objected to Nurse Hardy's testimony about his threats, there would have been insufficient evidence of felony harassment, so his attorney was ineffective. A statement is not hearsay, regardless of whether the person who made it is available to testify, if made "for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of

the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." ER 803(a)(4) (emphasis added). To establish reasonable pertinence, "(1) the declarant's motive in making the statement must be to promote treatment, and (2) the medical professional must have reasonably relied on the statement for purposes of treatment." In re Pers. Restraint of Grasso, 151 Wn.2d 1, 20, 84 P.3d 859 (2004).

Statements to medical personnel, including those attributing fault, are often held admissible in domestic violence and sexual abuse cases as reasonably pertinent to diagnosis and treatment.[3] "A declarant's statement disclosing the identity of a closely-related perpetrator is admissible under ER 803(a)(4) because part of reasonable treatment and therapy is to prevent recurrence and future injury." State v. Williams, 137 Wn. App. 736, 746, 154 P.3d 322 (2007).

In Williams, the court held that a forensic nurse's testimony regarding a rape victim's answers to a questionnaire was admissible, even though the victim did not initially feel she needed treatment. Williams, 137 Wn. App. at 746-47. Similarly, a victim's statement to a doctor that her boyfriend kicked her, hit her with his fists, and hit her several times with a belt was admissible where the doctor said the manner in which an injury occurs, including whether it was

[3] See Myrna Raeder, *Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past: Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 Brooklyn L. Rev. 311, 348-50 (Fall 2005), finding that statements for medical diagnosis and treatment are "staples in child abuse and domestic violence cases." 71 Brooklyn L. Rev. at 348.

inflicted by a stranger or a family member, impacts diagnosis and treatment. State v. Sandoval, 137 Wn. App. 532, 538, 154 P.3d 271 (2007). A victim's statements to a paramedic and emergency room physician, including those identifying her assailant, were admissible "because a doctor or social worker may recommend counseling or escape from the dangerous domestic environment as part of a treatment plan." State v. Saunders, 132 Wn. App. 592, 608, 132 P.3d 743 (2006), review denied, 159 Wn.2d 1017 (2007). The rationale for this exception to the hearsay rule is that courts presume a patient has a strong motive to be truthful and accurate, which provides a significant guarantee of trustworthiness. State v. Perez, 137 Wn. App. 97, 151 P.3d 249 (2007).

According to Ell, the State confuses the admissibility of medical hearsay about an assailant's identity with the necessity of admitting the exact words of Ell's threat. We disagree. Both Nurse Hardy and Dr. Naviaux testified that a "safety plan" is always included in sexual assault and domestic violence cases, as this is the next priority after assessing a patient's injuries. A safety plan was discussed with RHM, who decided to stay with her aunt and uncle and not return to the motel room she shared with Ell. And Nurse Hardy said RHM reported Ell's threat to kill her while responding to questions from the sexual assault report, as in Williams, where answers to such a questionnaire were deemed admissible. While Ell would like this court to narrow the hearsay exception for medical diagnosis and treatment, this exception is well settled in sexual assault and

domestic violence cases. Thus, we hold that Ell's ineffective assistance claim fails on the prejudice prong since the trial court would likely have admitted the medical hearsay testimony over counsel's objection.

B. *Jury Instruction on Voluntary Intoxication*

According to Ell, all his charges required a particular mental state, including, erroneously, the rape in the second degree charge, due to flawed jury instructions which became the "law of the case."[4] Thus, Ell argues, it would have been a valid defense that he could not form the requisite mental state for rape, assault, and felony harassment because he was too intoxicated, so his attorney was ineffective for failing to request a jury instruction on voluntary intoxication.

Counsel's failure to request an instruction can be raised for the first time on appeal as a constitutional ineffective assistance claim. RAP 2.5(a)(3); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). But if counsel's conduct can be characterized as a legitimate trial strategy, then it cannot constitute ineffective assistance. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856 (1992). Ell bears the burden of showing there were no legitimate strategic or tactical reasons behind defense counsel's decision. State v. Rainey, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001), review denied, 145 Wn.2d 1028 (2002).

When asked by the State and the court about a voluntary intoxication

[4] Assault in the second degree requires intent. RCW 9A.36.021. Felony harassment requires a knowing threat. RCW 9A.46.020. But intent is *not* an element of rape. State v. Brown, 78 Wn. App. 891, 896, 899 P.2d 34 (1995), review denied, 128 Wn.2d 1021 (1996). However, over defense objection, the trial court instructed the jury: "Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires," thereby including an unnecessary intent element. Because the State requested the erroneous instruction, it assumed the burden of proving the intent element of sexual gratification under the "law of the case." State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

instruction, Ell's attorney answered, "We are not arguing that voluntary intoxication, Your Honor." Ell's defense was that he was not the one who assaulted RHM or that no rape took place. By arguing voluntary intoxication to negate the intent required for assault and rape under the jury instructions, Ell would seem to admit he committed at least some of those offenses. On the stand, he admitted he was guilty only of one count of violating a no-contact order.[5] He also testified he did not see any bruising on RHM when she drove him to work the day after the alleged beating.

Ell's testimony of what happened that night varied: at different points, he said that nothing happened, that there was sexual intercourse but it was consensual, and that he did not remember whether anything happened. Despite his testimony that he was "damn near diminished capacity," Ell did remember calling the casino and speaking with RHM's supervisor that night, and getting up early the next morning and going to work. Moreover, evidence of Ell's intoxication would not be enough to warrant the instruction; what is relevant is "the degree of intoxication and the effect it had on the defendant's ability to formulate the requisite mental state." State v. Gallegos, 65 Wn. App. 230, 238, 828 P.2d 37, review denied, 119 Wn.2d 1024 (1992).

Ell's attorney would not be deficient to deem a voluntary intoxication instruction inconsistent with Ell's defense, given Ell's testimony that he did remember parts of the night in question, that nothing happened, and that the sex

[5] Ell was convicted of two counts of violation of a no-contact order and attempted violation of a no-contact order. The trial court dismissed a witness tampering charge on a defense motion.

was consensual. We deny this claim because defense counsel's choice to forego the instruction can be characterized as a legitimate trial strategy, and Ell fails to show there were no tactical reasons behind that decision.

Prosecutorial Misconduct

Ell argues prosecutorial misconduct denied him a fair trial because the prosecutor referred during closing argument to testimony impeaching RHM's statements as evidence of Ell's guilt. But Ell did not make any objections during the State's closing. If a defendant fails to object to prosecutorial misconduct, the claim is waived unless the conduct is so flagrant or ill-intentioned that no curative instruction could have neutralized its prejudicial effect. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). Misconduct does not create incurable prejudice unless: (1) there is substantial likelihood it affected the jury's verdict and (2) a well timed curative instruction could not have prevented the prejudice. State v. Brett, 126 Wn.2d 136, 175-76, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996). A decision not to object or move for a mistrial is strong evidence the prosecutor's argument was not critically prejudicial to the defendant. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991).

Ell contends the prosecutor committed flagrant misconduct by arguing that testimony admitted to impeach RHM's statements could be used as substantive evidence of his guilt, corroborated by physical evidence. He cites

this portion of the argument: "She was so consistent telling all these people. I don't know, add them up, seven, eight, nine people what happened to her, and the injuries that are consistent with that and corroborate that, and then you also have DNA that corroborates that further." Later, the prosecutor argued RHM "has a tough choice. [She] is between family, people she considers to be family, people she loves, and telling the truth. . . . She is seriously caught between the truth which is what she told on the 16th when she went through initially all these statements." The prosecutor argued RHM's statements were consistent until RHM had an interview with Ell's attorney, where Ell's mother, whom RHM is close to and calls "mom," was also present. Abitia, RHM's co-worker and friend, had testified RHM was concerned because she had learned from Ell's mother that Ell already had two strikes and would be jailed for life.

A prosecutor's comments in closing must be viewed in the context of the entire argument, the issues in the case, the evidence, and the jury instructions given. Russell, 125 Wn.2d at 85-86. Here, the prosecutor started by outlining the offenses and the instructions, and saying that RHM had recanted only as to the rape, the charge that carried the most time. She then compared the definition of rape by forcible compulsion to RHM's personal understanding of what constituted rape. She explained the difference between evidence used to impeach and substantive evidence of guilt:

> Because of the recantation as the rape -- as to the rape, there were a number of witnesses who were allowed to testify to impeach that part of her testimony . . . .
>
> So those prior statements she made that were inconsistent with what she told you here in court could come in so you could evaluate her

> credibility as to that piece of evidence as she's sitting here.
>
> You can say, okay, she told all these other people a different statement. She -- they were all consistent, but she told all of them differently, and that's different from her testimony here in court. You can then judge her credibility as to that based on those prior statements.
>
> Now what's a little different is the law allows certain statements she may make to certain people to come in to prove rape just as though she said it up here. Those are the medical professionals you heard from.
>
> So Nurse Hardy and Dr. Naviaux testifying, that comes in what we call substantively. It comes in to prove rape. So those statements that she made to the doctor and the nurse, those aren't coming in as we're just going to test her credibility. Those come in to prove the charge.
>
> . . . .
>
> Now, the interesting thing is when you go talk to a nurse or a doctor, and you're that injured, and you've been sexually assaulted, are those the people that you're going to be truthful to? . . .
>
> You say what happened, and that's when [RHM] said all of it.

Both before and during the witnesses' impeachment testimony, the court instructed the jury that that evidence was admitted for the limited purpose of addressing RHM's credibility regarding the recantation of the rape charge and other details. The written jury instruction told the jury: "Evidence has been introduced in this case for the limited purpose of impeachment. You must not consider this evidence for any other purpose." Defense counsel did not object to the instructions, but Ell now argues the prosecutor's misconduct was exacerbated because the instruction on impeachment was too vague. Ell contends the trial court should have used the current pattern instruction[6] and specified which evidence was for impeachment purposes. This argument

[6] "Certain evidence has been admitted in this case for only a limited purpose. This [evidence consists of _____ and] may be considered by you only for the purpose of _____. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation." 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 5.30, at 180 (3d ed. 2008).

ignores the fact that the court verbally instructed the jury during the testimony of each of the impeachment witnesses.[7]

Ell may be correct that the jury could have been confused in a trial with 21 witnesses, some of whose testimony was admitted only to impeach RHM's recantation and others whose testimony was admitted as medical hearsay and evidence of Ell's guilt. But the prosecutor prefaced her argument with an explanation of the difference between impeachment and substantive evidence, and the trial court instructed the jury properly both during testimony and before deliberations. The prosecutor's comments cannot be characterized as flagrant and ill intentioned misconduct, so we reject this claim.

Jury Question

Ell contends the trial court erred when it answered a jury question regarding an assault instruction without consulting him and counsel, and argues the error was not harmless. Ell's attorney objected to the placement of the instructions on the lesser included charge of assault in the fourth degree. The court included a definition of assault in the fourth degree, but placed that definition 16 pages after the assault in the second degree definitions, following

[7] For example, the trial court said, during testimony of Monica Abitia:

> Do you remember, ladies and gentlemen, last week there was a witness who was speaking about what . . . the alleged victim had said, and I cautioned you to consider that evidence for the sole purpose of impeaching the complaining witness' testimony, . . . not for the truth of the matters, themselves, but only to determine whether or not you believe that testimony was consistent with what you're hearing today.
>
> This again is the same situation.

instructions on the charges of harassment and no-contact order violations. Defense counsel was concerned the order of the assault instructions would confuse the jury. But the judge preferred to keep the instructions in the same order as the information: "They'll all be read to them . . . they'll know that they exist . . . . So I think the order is less important than the fact that they're all there."

The morning after receiving the instructions, the jury submitted the following note to the court: "The jury requests a definition for assault in the fourth degree, similar to the definition of assault in the second degree found in instruction no. 21." The record does not show the court consulted with the parties. Rather, seven minutes after the question was submitted, the trial judge responded: "The definitions provided in the instructions are sufficient for the jury to use. Refer to the instructions as a whole."

Ell argues that had defense counsel been consulted, "it is likely a more informative answer to the question could have been crafted that would have remedied the confusion, such as specifically referring the jury to instruction number 20." Instruction 20 followed the definition of second degree assault, and contained the general definition of assault.[8]

---

[8] Instruction 20:

> An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.
>
> An assault is also an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

When the jury asks questions during deliberations, the court "shall notify the parties of the contents of the questions and provide them with an opportunity to comment upon an appropriate response." CrR 6.15(f)(1). The rule has a constitutional underpinning: a defendant has the right to be present at all critical stages of his trial proceedings, which includes the trial court responding to jury questions. State v. Ratliff, 121 Wn. App. 642, 646, 90 P.3d 79 (2004). Any communication between the court and the jury in the absence of the defendant is error and must be proven by the State to be harmless beyond a reasonable doubt. State v. Langdon, 42 Wn. App. 715, 717, 713 P.2d 120, review denied, 105 Wn.2d 1013 (1986); State v. Allen, 50 Wn. App. 412, 419, 749 P.2d 702, review denied, 110 Wn.2d 1024 (1988). Where the judge's response conveys no affirmative information, typically no prejudice results and the error is harmless. See, e.g., Allen, 50 Wn. App. at 419 (jury told to read instructions and continue deliberations). There is no basis for concluding otherwise in the present case.

Trial judges are appropriately concerned about the possibility that giving a substantive answer to a jury's question will be construed as a comment on the evidence. Still, the practice of bypassing the required consultation with the parties and simply referring the jury to the instructions is *not* a safe harbor. For example, this court held the trial court's failure to answer the jury's questions on the definition of "intent," which highlighted the jury's confusion on the matter, was error which was not harmless. State v. Tyler, 47 Wn. App. 648, 653, 736

P.2d 1090 (trial judge had answered, "I cannot instruct further"), overruled on other grounds by State v. Delcambre, 116 Wn.2d 444, 805 P.2d 233 (1991). The parties may have useful suggestions about how to answer. The rule requires the court to notify the parties. The court here committed error by failing to do so. We find the error harmless, but emphasize that it was an error; and it should not become a routine practice.

Sentencing

Finally, Ell argues the trial court erred in failing to vacate his harassment conviction when it found this conviction constituted the same criminal conduct as one of the assault convictions for purposes of calculating Ell's offender score. The court sentenced Ell within the standard range on all the convictions, including 22 months on the harassment charge, all to run concurrently. Ell's total confinement is 280 months, which is his sentence for the most severe offense, rape in the second degree.

Ell contends the trial court violated the double jeopardy clauses of the federal and state constitutions because the court should have vacated his felony harassment conviction. He relies solely on State v. Womac, 160 Wn.2d 643, 650-56, 160 P.3d 40 (2007). Womac dealt with the proper remedy when two convictions are deemed the same for double jeopardy, not for offender score calculation purposes. Ell disregards that his attorney argued successfully for a finding of the same criminal conduct on the harassment and assault convictions for offender score purposes under RCW 9.94A.589(1)(a).[9]

[9] RCW 9.94A.589(1)(a) provides in part that "if the court enters a finding that

Same criminal conduct is conduct involving the same victim, the same objective intent, and occurring at the same time and place. State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). The trial court properly found the felony harassment was the same criminal conduct as one of the assaults and reduced Ell's offender score accordingly. Thus, we deny Ell's claim on this issue.

Affirmed.

Becker, J.

WE CONCUR:

Schindler, J. Ellington, J.

some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime."